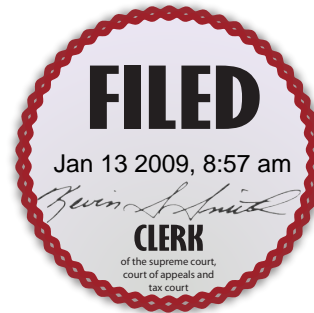


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

KRISTEN A. MULHOLLAND
Appellate Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ALEX O. JAMES
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JERRY PELLEGRINO,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 45A03-0805-CR-240

APPEAL FROM THE LAKE SUPERIOR COURT
CRIMINAL DIVISION
The Honorable Kathleen A. Sullivan, Judge Pro Tempore
Cause No. 45G02-0709-FC-112

January 13, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Defendant-Appellant, Jerry Pellegrino (Pellegrino), appeals the sentence imposed after he pled guilty to burglary, as a Class C felony, Ind. Code § 35-43-2-1.

We affirm.

ISSUES

Pellegrino raises two issues on appeal, which we restate as follows:

- (1) Whether the trial court abused its discretion in failing to find that Pellegrino's mental illness and physical injuries were not mitigating factors to be considered in the sentencing decision; and
- (2) Whether Pellerino's sentence is inappropriate.

FACTS AND PROCEDURAL HISTORY

The parties stipulated that, on August 9, 2007, Pellegrino broke a window to enter an auto trailer at C & G Auto Sales in Gary, Indiana, with the intent to steal property, though he did not end up taking anything. On September 7, 2007, the State filed an Information charging Pellegrino with burglary, as a Class C felony, I.C. § 35-43-2-1. Pellegrino was arrested on September 14, 2007. The day before his arrest, Pellegrino had surgery because of a work incident in which he cut his leg with a saw. Pellegrino asked to be released on his own recognizance because of his recent surgery. The trial court denied his request, but ordered the medical director of the Lake County Jail to treat Pellegrino according to his medical needs.

On November 16, 2007, Pellegrino filed a Motion to be Heard Regarding Defendant's Medical Issues. In his motion, Pellegrino asked that he be provided a cane, crutches, or a wheelchair, and that he be allowed to take his prescribed medications at the prescribed dosages while in jail. The court directed Pellegrino to provide a letter from his physician regarding his medical needs. At a hearing on December 11, 2007, Pellegrino provided the court with a letter and information from his counsel regarding his physician's recommendations. Pellegrino's attorney informed the court that a doctor had opined that Pellegrino was receiving the appropriate medications for his condition while incarcerated and that "a wheelchair, physical therapy, and being in a tub" were not necessary. (Transcript p. 11).

On February 19, 2008, Pellegrino pled guilty by agreement to Class C felony burglary. In the plea agreement, the parties agreed to a cap of six years on Pellegrino's sentence, and the State agreed not to file an habitual offender information. On April 10, 2008, the trial court sentenced Pellegrino to a six year executed sentence with the Indiana Department of Correction. The trial court did not find any mitigating circumstances, but found two aggravating circumstances: Pellegrino's criminal history and the fact that he had recently violated the conditions of his probation.

Pellegrino now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Mitigating Factors

Pellegrino contends that the trial court erred in failing to consider his mental illness and physical ailments as mitigating factors in its sentencing decision. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Anglemyer*, 868 N.E.2d at 490. An allegation that the trial court abused its discretion by failing to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.* at 493. However, if, after counsel has argued the existence of a mitigating factor, the trial court does not find a mitigating factor, the trial court is not obligated to explain its finding that the mitigating factor does not exist. *Id.*

Pellegrino first argues that the trial court abused its discretion by failing to consider his mental illness as a mitigating factor. In support of his argument, Pellegrino cites *Weeks v. State*, 697 N.E.2d 28, 31 (Ind. 1998), in which our supreme court listed several factors to be considered in determining the mitigating weight, if any, of a defendant's mental illness:

(1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment, (2) overall limitations on functioning, (3) the duration of the mental illness, and (4) the extent of any nexus between the disorder or impairment and the commission of the crime.

Pellegrino directs us to the testimony of Peggy Kresich (Kresich), the Director of Nursing at Miller Beach Terrace, a residential care facility where Pellegrino had lived at various times. At Pellegrino's sentencing hearing, Kresich testified that Pellegrino suffers from major depression with symptoms of poor judgment and poor impulse control. Pellegrino argues that the trial court should have identified his mental illness as a mitigating factor based on Kresich's testimony. However, Pellegrino makes no attempt to apply the four factors from *Weeks* to that testimony. He does not contend that he was unable to control his behavior due to his mental illness or that his mental condition was an overall limitation on his functioning. Further, while Pellegrino notes that he was living at Miller Beach Terrace for over a year-and-a-half prior to his incarceration in this case, he does not tell us the exact duration of his mental illness. Finally, Pellegrino does not draw any discernible nexus between his commission of the crime and his mental illness. Pellegrino failed to establish that his mental illness was significant and clearly established by the record. As such, we cannot say that the trial court abused its discretion by failing to find Pellegrino's mental illness as a mitigating factor.

Next, Pellegrino argues that the trial court abused its discretion when it did not consider his physical condition as a mitigating factor in its sentencing decision. Specifically, Pellegrino argues that he is in need of medical care that he will not receive while he is incarcerated. However, Pellegrino cites only one page of the record in support of his argument, and that page contains the argument of his attorney, which is not evidence. (*See* Tr. p. 39). Moreover, at the hearing concerning Pellegrino's Motion to be Heard Regarding

Medical Issues, Pellegrino's attorney informed the trial court that a physician determined that Pellegrino's requests were unnecessary. Therefore, we find that the trial court did not abuse its discretion in failing to find Pellegrino's physical condition as a mitigating circumstance.

II. *Inappropriateness*

Pellegrino also contends that his sentence of six years is inappropriate. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence imposed by the trial court. *Anglemyer*, 868 N.E.2d at 491. The appellate court's authority is exercised through Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." On these grounds, a criminal defendant may challenge his or her sentence if the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but where the trial court imposed a sentence with which the defendant takes issue. *Anglemyer*, 868 N.E.2d at 491.

We acknowledge that there was nothing particularly heinous about Pellegrino's offense. As to Pellegrino's character, however, the pre-sentence investigation report reflects that Pellegrino has an extensive criminal background. Pellegrino has previously pled guilty

to eight felonies and seven misdemeanors:¹ retail theft, a misdemeanor, in 1980 and again in 1984; battery, a misdemeanor, in 1986; theft, a felony, burglary, a felony, and retail theft, a misdemeanor, all in 1988; retail theft, a misdemeanor, in 1991; retail theft, a felony, in 1992; retail theft, a felony, in 1994; grand theft of a motor vehicle, a felony, and petty larceny, a misdemeanor, in 1996; burglary, a felony, in 1998; robbery, a felony, in 2000; theft, a felony, in 2006; and, in 2007, conversion, a misdemeanor. Pellegrino's offenses, the majority of which for theft, burglary, or robbery, are frequent, as evidenced by his record. Since 1984, most of Pellegrino's offenses have been no more than two years apart. The only period during which there was a greater amount of time between Pellegrino's offenses started in 2001, when Pellegrino was sentenced to eight years for Class B felony robbery. Further, Pellegrino committed Class D felony theft in 2006 and was given probation, which he violated. As the trial court observed, as soon as Pellegrino serves a sentence, he commits another offense: "I mean, this criminal history, you have gone consistently, as soon as you're done serving your time, you go out and you commit another offense, almost immediately, if you look at the docket the dates of his criminal history." (Tr. p. 45). The court also noted Pellegrino's inability to complete probation and its desire to protect society from Pellegrino. *Id.* In sum, Pellegrino's character provides evidence of repeated crimes against property and further shows the lack of deterrent effect of his past sentences and probation upon his later

¹ The State, the trial court, and the probation department all stated that Pellegrino has six prior misdemeanor convictions. However, there are seven listed in the pre-sentence investigation report. (See Pre-Sentence Investigation Report pp. 3-7).

conduct. Therefore, we are unpersuaded that Pellegrino's character justifies revising his sentence.

Additionally, we note that Pellegrino's sentence could have been much longer. First, Pellegrino's sentence was capped at six years, two years less than the maximum sentence of eight years for a Class C felony. Second, because of his multiple prior felony convictions, Pellegrino could have easily been found to be an habitual offender, which could have increased his sentence by as much as twelve years. *See* I.C. § 35-50-2-8. But for the State's willingness to refrain from filing an habitual offender information and to cap his sentence at six years, Pellegrino could have served a total of twenty years. Considering the nature of Pellegrino's offense and his character, his sentence of six years is not inappropriate.

CONCLUSION

For the foregoing reasons, we conclude that the trial court did not abuse its discretion when it failed to find Pellegrino's mental illness and physical condition as mitigating circumstances. Also, Pellegrino's sentence is not inappropriate.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.